Building Industry Association
of Southern California
1330 South Valley Vista Drive
Diamond Bar, CA 91765
(909) 396-9993

Building Industry Association
Los Angeles/Ventura Chapter
28460 Avenue Stanford, Suite 110
Santa Clarita, CA 91355
(661) 257-5046

April 10, 2009

Submitted Via Email to: VenturaMS4Comments041009@waterboards.ca.gov

Original sent by Overnight Mail

Attn: Tracy Woods, Storm Water Permitting
320 W. Fourth Street
Suite 200
Los Angeles, California 90013

Re: Comments from Construction Industry Representatives Concerning the April 2008 Draft Tentative NPDES Permit No. CAS004002 – Ventura MS4.

Dear Ms. Woods:

Thank you for this opportunity to respond to the tentative Waste Discharge Requirements for Municipal Storm Water Discharges within the Ventura County Watershed Protection District, County of Ventura and the Incorporated Cities Therein (hereinafter, the "4th Draft Permit"), which was released on February 24, 2009, by the staff of the State of California, Los Angeles Regional Water Quality Control Board (the "Board"). The comments herein are those of the following entities, each of which represents the homebuilding industry or related construction and land development industries within the Southern California region that includes Ventura County. Specifically, the comments are from:

- Building Industry Association of Southern California, Inc. ("BIA/SC");
- The Los Angeles/Ventura Chapter of BIA/SC ("LAV"); and
- Building Industry Legal Defense Foundation ("BILD").

BIA/SC is a nonprofit trade association representing more than 1,700 member companies, which together have more than 100,000 employees. LAV, a Chapter of BIA/SC, represents approximately 400 member companies involved in every aspect of building and providing homes in Ventura County and most of Los Angeles County. BILD is a non-profit mutual benefit corporation and wholly-controlled affiliate of BIA/SC. BILD's purposes are to monitor legal and regulatory conditions for the

construction industry in Southern California and intervene as appropriate. BILD focuses particularly on litigation and regulatory matters with a regional or statewide significance to its mission.

During and between the comment periods on four different drafts of the permit, we have met with Board staff in efforts to explain our views on the provisions reflected in those drafts. We have also participated in numerous stakeholder meetings to discuss concerns about the proposed requirements, and submitted extensive comments on the previous drafts. We understand and support the goals of the permit – including the goal of improving water quality by increasing use of low impact development techniques and otherwise influencing land use policy.

In addition to our deep involvement concerning Ventura County, we have similarly been very actively involved in discussions concerning the proposed revisions of similar permits covering different land areas. For example, we have been very involved in discussions concerning the recently released tentative permit for North Orange County (Region 8, the Santa Ana Regional Water Quality Control Board). In addition, we have been working closely with our regulated community counterparts in the San Francisco Bay area.

As our years of involvement have progressed, we have been and remain impressed with the hard work and engagement of the Board's staff. We remain very concerned, however, about some key aspects the 4th Draft Permit. Even though some objectionable aspects of the earlier drafts have been removed or corrected, we remain concerned that the 4th Draft Permit would in fact damage the land use development process and do substantially harm the already strained economy of Ventura County. Given that the current direction of the Board is to take the requirements of this permit and apply them in the future to LA County, we must again express our disappointment that the 4th Draft Permit still fails to the best policy options, despite our efforts to bring science, reason and experience to help craft reasonable and practicable requirements in the new MS4 permit.

In order to emphasize our main concerns, our comments below are aimed mainly at the Land Use Development section of the tentative permit (Section E), as well as the numeric performance standards in the 4th Draft Permit.

1. **The proposed permit conditions were not derived following consideration of the statutory factors set forth in California Water Code Section 13241.**

When enacting water quality requirements, the Board is obligated to "balance" using the considerations identified in Water Code section 13241, and made applicable to permit requirements by Water Code section 13263 (in accordance with *City of Burbank v. State Water Resources Control Bd*). This requirement is all the more imperative in the instant circumstance, because there is now – as a consequence of recent litigation – a

judicial cloud over the regional basin plan due to the Board's persistent refusal to consider the Water Code sections 13241 factors are they relate to storm water. Particularly given the status of the basin plan, it is obviously perilous for the Board to again fail to take into account the section 13241 factors.

The 4th Draft Permit states, however, that consideration of the Calif. Water Code section 13241 factors is *not* required, suggesting instead that the federal standard for MS4 permitting set forth in 33 U.S.C. section 1324(p)(3)(B)(iii) preempts the need or ability to consider the section 13241 factors. *See* Findings E.25 at p. 21. This legal conclusion is erroneous.

It is true that the relevant federal statute law at issue – 33 U.S.C. section 1324(p)(3)(B)(iii) – directs the Board (here, as the U.S. E.P.A. Administrator's surrogate) to "require controls to reduce the discharge of pollutants to the maximum extent practicable[.]" However, this introductory "maximum extent practicable" directive is what is called "hortatory" (meaning it merely *encourages* or exhorts action) rather than mandatory (indicating any legally enforceable mandate). *See Rodriguez v. West*, 189 F.3d 1351, 1355 (Fed. Cir. 1999) (holding that the express "maximum extent possible" directive of former 38 U.S.C. section 7722(d) was "hortatory rather than to impose enforceable legal obligations"). Because the language is introductory and hortatory, it does not require the Board to impose any and all possible requirements. Instead, the directive is merely a charge to go forth, balance interests, and require *some* reasonable controls.[1] Certainly, the federal directive is not a Congressional mandate to be immoderate.

Our reading of the relevant federal statute is bolstered by the remainder of 33 U.S.C. section 1324(p)(3)(B)(iii). Immediately following the introductory "maximum extent practicable" language is this: "including management practices, control techniques and system, design and engineering methods, and such other provisions as the Administrator or the State ***determines appropriate*** for the control of such pollutants."

---

[1] *See Conservation Law Foundation v. Evans*, 360 F.3d 21, 28 (1st Cir. 2004):

> [The environmentalist plaintiffs] essentially call for an interpretation of the statute that equates "practicability" with "possibility," requiring [the agency] to implement virtually any measure ... so long as it is feasible. Although the distinction between the two may sometimes be fine, there is indeed a distinction. *The closer one gets to the [environmentalists'] interpretation, the less weighing and balancing is permitted.* We think by using the term "practicable" Congress intended rather to allow for the application of agency expertise and discretion in determining how best to manage ... resources.

(Emphasis added.)

(Emphasis added.) Thus, the federal statute merely instructs the Board (as the E.P.A. Administrator's surrogate here) to *exercise its broad discretion* – within bounds of reason, of course.

The federal courts have consistently ruled that the section 1324(p)(3)(B)(iii) federal directive is one mandating only the reasonable exercise of broad discretion – nothing more. *See Arkansas v. Oklahoma*, 503 U.S. 91, 105 (1992) ("Congress has vested in the [EPA or a surrogate state] broad discretion to establish conditions for NPDES permits."); *Natural Resources Defense Council, Inc. v. U.S. E.P.A.*, 966 F.2d 1292, 1308 (9th Cir. 1992) ("NRDC contends that EPA has failed to establish substantive controls for municipal storm water discharges as required by the 1987 amendments. *Because Congress gave the administrator discretion to determine what controls are necessary, NRDC's argument fails. * * * Congress did not mandate a minimum standards approach or specify ... minimal performance requirements.*" (emphasis added)); *Defenders of Wildlife v. Browner*, 191 F.3d 1159, 1166-67 (9th Cir. 1999) ("Under [the MEP standard set forth in Clear Water Act section 402(p)(3)(B)(iii)], the EPA's choice to include [or exclude] ... limitations in [NPDES] permits [for MS4s] was within its discretion."); *City of Abilene v. U.S. E.P.A*, 325 F.3d 657, (5th Cir. 2003) ("The plain language of [CWA section 402(p)] clearly confers broad discretion on the EPA [or a surrogate state agency] to impose pollution control requirements when issuing NPDES permits").

Given that the federal directive set forth in section 1324(p)(3)(B)(iii) merely mandates that the Board must take evidence and exercise its broad discretion concerning permit conditions, there is surely no conflict – of the type giving rise to federal preemption concerns – between 33 U.S.C. section 1324(p)(3)(B)(iii), on the one hand, and Calif. Water Code section 13241, on the other hand. The latter (Water Code section 13241) requires the Board to *consider*, when exercising its discretion, a certain list of *non-exclusive* factors (beneficial uses, environmental characteristics, realistic outcomes, economics, the need for housing, and the need to recycle water). California law further requires the Board to provide a record of the required analysis which is sufficient to demonstrate that it has meaningfully weighed and considered each of the prescribed non-exclusive factors. *See Topanga Assn. for a Scenic Community v. County of Los Angeles* (1974) 11 Cal.3d 506, 515: "[T]he agency which renders the challenged decision must set forth findings to bridge the analytic gap between the raw evidence and ultimate decision or order.... [The agency must reveal] the relationships between evidence and findings and between findings and ultimate action...."

In short, there is nothing about exercising discretion in compliance with Calif. Water Code sections 13241 and 13263 which conflicts with the federal mandate to go forth and exercise broad discretion when regulating MS4 permittees. The Supreme Court of the United States has stated that courts should always attempt to reconcile laws to avoid finding federal preemption. *See Merrill Lynch, Pierce, Fenner & Smith v. Ware*, 414 U.S. 117, 127 (1973); *see also Rice v. Norman Williams Co.*, 458 U.S. 654, 659

(1982) ("[T]he inquiry is whether there exists an *irreconcilable conflict* between the federal and state regulatory schemes."). Both state and federal courts generally recognize a presumption *against* finding federal preemption, even when there is express preemptive language. *See, e.g., Washington Mutual Bank, FA v. Superior Court*, 75 Cal.App.4th 773 (1999):

> In interpreting the extent of the express [federal] preemption, courts must be mindful that there is a strong presumption against preemption or displacement of state laws. Moreover, this presumption against preemption applies not only to state substantive requirements, but also to state causes of action.

Id. at 782, *citing Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 523 (1992) and *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996). In the absence of express federal preemptive language, the presumption against finding federal preemption is even stronger:

> "In the absence of express pre-emptive language, Congress' intent to pre-empt all state law in a particular area may be inferred where the scheme of federal regulation is sufficiently comprehensive to make reasonable the inference that Congress 'left no room' for supplementary state regulation.

Hillsborough County v. Automated Medical Labs, 471 U.S. 707, 713 (1985).

In addition, the question of whether federal preemption exists is purely a question of law. *See, e.g., Industrial Trucking Association v. Henry*, 125 F.3d 1305, 1309 (9th Cir. 1997), *citing Inland Empire Chapter of Associated Gen. Contractors v. Dear*, 77 F.3d 296, 299 (9th Cir.1996) and *Aloha Airlines, Inc. v. Ahue*, 12 F.3d 1498, 1500 (9th Cir.1993) ("The construction of a statute is a question of law that we review de novo.... Preemption is also a matter of law subject to de novo review."). It does not matter that federal preemption springs from express statutory language or from federal regulations promulgated under a statute. In either event, federal preemption is a question of law. *See Bammerlin v. Navistar International Transportation Corp.*, 30 F.3d 898, 901 (7th Cir. 1994) (meanings of federal regulations are questions of law to be resolved by the court).

Given that the existence and extent of federal preemption is properly as a question of law, the burden of demonstrating to a court that preemption exists rests with the party asserting the preemption (here, the Board) – because federal preemption is an affirmative defense. *See Bronco Wine Co. v. Jolly*, 33 Cal.4th 943, 956-57 (2004) ("The party who claims that a state statute is preempted by federal law bears the burden of demonstrating preemption."); *see also United States v. Skinna*, 931 F.2d 530, 533 (9th Cir.1990) (stating that the burden is on the party asserting a federal preemption defense). Therefore, if the Board asserts (as the 4th Draft Permit suggests it will) that federal law preempts the consideration and application of the Porter-Cologne Act's factors, the Board would bear

the burden of demonstrating, as a matter of law, that actions required of it under its enabling state law are preempted.

Armed with this understanding of the law, the Board cannot reasonably maintain that the federal law precludes application of the California Water Code § 13241 balancing factors to the weighty policy choices before it. But the 4th Draft Permit's betrays a failure – an admitted failure – to consider the section 13241 factors. As explained below, many of the proposed permit conditions in the 4th Draft Permit would not survive a fair consideration of the section 13241 factors.

2. **The parcel-by-parcel 5% limitation on Effective Impervious Area does not respect appropriate development patterns and scales, and is not consistent with the underlying research or sound policy.**

The 4th Draft Permit still includes the requirement that land use development projects limit the "effective impervious area" (EIA) to 5% of any project site. We have many concerns with this proposed requirement, not the least of which is that the study was based on research that correlates *imperviousness in an entire watershed* with water quality. Despite the fact that the research was conducted at an overall watershed scale, the 4th Draft Permit applies a "one-size-fits-all" imperviousness standard at the project or parcel scale.

In addition, there are myriad places where it would be unhelpful (at best) or harmful (worse) to apply an imperviousness standard for purposes of facilitating storm water retention and infiltration. For example, bluff tops (such as those at Pacific Palisades or at La Conchita Ranch farther west) would likely be rendered unstable by any mandate of imperviousness and infiltration coupled with development. Even moderately sloping hillsides would be negatively affected, as would areas where the natural water table is relatively high (for example, Moorpark in Ventura County). Nor would the EIA requirement do any good where development occurs on top of hard pan soils or bedrock, where infiltration could not occur. In many such areas, storm water would flow very *naturally* off of the parcel.

Also, as we have noted before, a 5% EIA requirement would have additional ramifications that are problematic. For example, the requirement would – on a relative basis – encourage and incentivize sprawl, steering development to areas that have the most open space and flexibility concerning perimeter features. Such policy implications are particularly problematic in Ventura County, which has a strict SOAR initiative (urban growth limitations), such that maximum flexibility to accommodate dense development should be maintained. Similarly, the requirement would incentivize development on relatively porous soils (which could be used better at a regional scale), while discouraging development on impervious ground, even though the latter could be developed with the least change to pre-development flows.

Because the proposed EIA requirement would apply notwithstanding the myriad circumstances where it would be inappropriate (suboptimal at best, disastrous at worst), the requirement is proposed in disregard of Calif. Water Code section 13241(b), which requires consideration of the "[e]nvironmental characteristics of the hydrographic unit under consideration." Attention to this consideration would indicate that – of course – a 5% EIA requirement should not be generally or universally imposed.

We believe that a *volumetric* engineering approach, coupled with appropriate exceptions or waivers (based on objective criteria or, better yet, site-specific circumstances as determine by those with the closest proximity) is far better than an EIA approach. Ideally, the volumetric engineering approach would be based on calculations that seek to approximate, as closely as practicable, the pre-construction run-off patterns (a so-called "delta volume" or "delta-v" approach). However, as an administrative, regulatory and engineering expedient, we would subscribe to (and have supported in North Orange County discussions) the collection and treatment of the entire volume of a reasonably moderate design storm.

The 4th Draft Permit proposes a path for redevelopment projects as an alternative to the 5% EIA requirement, called the Redevelopment Project Area Management Plan (RPAMP). The role of the RPAMP is to afford the co-permittees the authority to develop larger scale solutions that meet water quality goals – on a scale larger than individual projects. We support the seeming intent behind the RPAMP, because it seems aimed at allowing site-specific considerations and appropriate tailoring to site-specific circumstances. However, we believe that attention and tailoring to site-specific circumstances needs to be the rule, not an exception to a "one-size-fits-all" rule like the 5% EIA rule.

3. As proposed, the 4th Draft Permit's EIA requirement violates both the "Natural Flow Doctrine" and the Clean Water Act's overall objective to "Restore and Maintain" the natural integrity of the water cycle.

One aspect of the 4th Draft Permit is especially radical and objectionable. That is the New Development/Redevelopment Performance Criteria on page 55 of 121. Particularly, section 5.E.III.1(c), states that the proposed 5% EIA requirement could generally be met only by the "infiltration and stor[age] for reuse" of the volume of a design storm. As proposed, the provision would seemingly impose, for the first time, a generally-applicable requirement that ***no storm water (from a design storm) should leave a parcel that has been developed or redeveloped.***

As it reads, this requirement seemingly flies in the face of recognized, basic low impact development (LID) strategies, which generally aim to have LID undertaken so that the pre-construction flows of storm waters are maintained, matched, or reasonably approximated. For example, the U.S. E.P.A.'s definition of LID, which was updated just last month, states clearly that the use of LID best management practices (BMPs) for the

filtration **(not just** ***infiltration***) is appropriate – and repeats the basic goal of trying to maintain pre-construction hydrology. Specifically, the US EPA defines LID as follows:

> *A comprehensive stormwater management and site-design technique. Within the LID framework,* ***the goal of any construction project is to design a hydrologically functional site that mimics predevelopment conditions****. This is achieved by using design techniques that infiltrate,* ***filter****, evaporate, and store runoff close to its source.* (Emphasis added)
>
> http://cfpub1.epa.gov/npdes/greeninfrastructure/information.cfm#glossary

As proposed, however, the language of the 4th Draft Permit generally rules out the use of LID BMPs for *filtration*, and instead requires generally implementing designs for the *retention* of all storm water for the design storm (which, in parts of Ventura County, could be up to 1½ inches of rain).

Rejecting the use of LID BMPs for filtration – and instead, as a general proposition, requiring that no storm water (except in the largest rains) can leave a developed or redeveloped parcel – is a radical measure that should not be undertaken. It would violate millennia (literally) of civil law concerning flows of storm water (called "diffuse surface water"). Specifically, the law in California – which itself is derived from the laws of the ancient Roman Empire – has long favored what is called the "***natural flow doctrine***," which states that diffuse surface flows should be permitted to flow from all lands to their natural water course. *See Gdowski v. Louie*, 84 Cal.App.4th 1395, 1402 (2000) ("California has always followed the civil law rule. That principle meant 'the owner of an upper ... estate is entitled to discharge surface water from his land *as the water naturally flows*. As a corollary to this, the upper owner is liable for any damage he causes to adjacent property *in an unnatural manner*.... In essence each property owner's duty is to leave the natural flow of water undisturbed.'" – emphasis added by the court, quoting *Keys v. Romley*, 64 Cal.2d 396, 405-06 (1966)).

The "natural flow doctrine" has been altered by the California courts in recent decades to facilitate reasonable land development and protect private and public land owners. Replacing the natural flow doctrine is a "***modern reasonableness test.***" Property owners (public and private) may alter the natural flow of diffuse and/or discrete surface water, but only if they are reasonable when doing so, and downstream owners can then trump the reasonable efforts of the upstream owner if they also take reasonable defensive steps. *See Locklin v. City of Lafayette*, 7 Cal.4th 327, 337 (1994).

Juxtaposed against both the natural flow doctrine and the modern reasonableness test is a third, much less favored doctrine, called the "***common enemy doctrine.***" The common enemy doctrine stands for three propositions, that (i) individual property (development) rights are paramount, (ii) storm water is a common scourge, and (iii) each property owner may act "for herself or himself" and take steps to alter the natural or

unnatural flow of such waters for the protection of his or her property, without regard for the effect on neighbors. *See Skoumbas v. City of Orinda*, 165 Cal.App.4th 783, 792 (2008). Although the common enemy doctrine is sometimes still applied in a few other states, the common enemy doctrine has been largely discredited and criticized by progressive courts, environmentalists, academics, and concerned policy makers because of the obvious and very negative implications for the broader community and for the preservation and restoration of natural flows. *See Keys v. Romley*, 64 Cal.2d 396, 400-03 (1966) (Mosk, J., concurring).

Of these three doctrines (the *natural flow* doctrine, the *modern reasonableness* test, and the *common enemy* doctrine), the *natural flow* doctrine – which seeks to *maintain the natural flows* of diffuse and discrete surface water – is the doctrine that conforms best to the federal Clean Water Act's overarching objective to "restore and *maintain*" the natural integrity of waters.[2] *See* 33 U.S.C. § 1251(a). Accordingly, we would, of course, expect the Board and the non-governmental organizations that defend natural resources to prefer strongly the *natural flow doctrine*, and to deviate from it (if at all) only as reasonably necessary to accommodate competing societal goals.

Rather than favor the natural flow doctrine, however, the 4th Draft Permit – with its seeming refusal to allow generally (i) the *filtration* of diffuse surface water, and (ii) any discharge across property lines – would establish a new and different doctrine, a "***universal retention doctrine***," standing for the general proposition that no diffuse surface water should leave any parcel that has been developed or redeveloped, except in very large storms.

If it were the intent of the Board's staff to propose such a universal retention doctrine, such a radical step should not be taken without far more discussion, study, and major revision. However, we see such a new doctrine as apparently reflected in Section 5.E.II.1(c) of the 4th Draft Permit (p. 55 of 121). In addition, we see such a universal retention doctrine reflected in the latest urgings of Natural Resources Defense Council, Inc. ("NRDC") – both in recent discussions concerning the North Orange County MS4 permit revisions and in a very recently revealed product of secret discussions between NRDC, certain other non-governmental groups, and some city managers in Ventura County. The recent revelations about these discussions show that NRDC and the others who were closeted away would generally impose a new *universal retention doctrine* on all development and redevelopment, especially suburban and exurban development.

---

[2] *See* S. Rep. No. 92-414, 92 Cong. 2d Sess., 2 U.S. Code Cong. & Adm. News '72 3668, 3674 (1972) ("The Committee believes the restoration of the natural chemical, physical, and biological integrity of the Nation's waters is essential."); H.R.Rep. No. 92-911, p. 76 (1972) (""the word 'integrity' ... refers to a condition in which the natural structure and function of ecosystems is [are] maintained.").

It is very hard to believe that non-governmental organizations that aim to defend natural resources would turn their back on the *natural flow doctrine*, rather than seek to maintain or approximate the natural flows or diffuse and discrete surface waters to the extent and where practicable. But that is what seems to be happening here, even as the U.S. E.P.A. and others are urging that suburban and exurban development should seek to maintain natural flows.

We respectfully urge the Board and staff to reject any embrace of a new *universal retention doctrine*. We urge instead appreciation of the *natural flow doctrine* or, better yet, the *modern reasonableness test* applied with ever-evolving and progressive standards of reasonableness. We suspect that the U.S. E.P.A. would similarly urge abandonment of a universal retention proposition (assuming the E.P.A. representatives are fully aware and fathom the policy implications of the proposal). In addition, we have only barely discussed this new, general universal retention doctrine with the appropriate individuals at the California Department of Fish and Game and the U.S. Fish and Wildlife Service. We found that they were not aware of the implications of the Draft Permit. For example, today, Mr. Roger Root of the U.S. Fish and Wildlife Service's Ventura Office informed us that he has no record or understanding that their staff was ever notified about any proposed permit requirements which would generally and intentionally interfere with the natural flows of water. We urge the Board's staff to thoroughly discuss the new and generally-applicable universal retention policy carefully with your fellow agency counterparts, and then remove any preference for or use of the universal retention doctrine from the eventual permit revisions.

4. **The permit requirements still need to be better integrated into the California Environmental Quality Act.**

As our industry representatives have noted before, California law has long established CEQA as the mechanism for evaluating – and mitigating – the environmental impacts of land development. The CEQA process evaluates all environmental impacts and provides a consistent process for their mitigation, with opportunity for input from a wide cross-section of agencies and public interests. Moreover, CEQA continues to evolve as science and policy imperatives drive it to do so. (For example, several years ago, green house gas emissions were never a focus of CEQA; now they certainly are.)

By establishing fixed, inflexible numeric standards for low impact development, the 4th Draft Permit trumps all other considerations (environmental and otherwise) and improperly shifts land use approval authority to the Board. Although the 4th Draft Permit may refer to waivers or exceptions for infeasibility, the 4th Draft Permit provides no clear process for this site-specific evaluation by the co-permittees and exceptions where the permit requirements are unreasonable, infeasible or suboptimal.

CEQA could – and we maintain should – be utilized to integrate low impact development and grading considerations into the project approval process in ways

heretofore not applied. This would allow for the appropriate evaluation of water quality impacts in the context of all other environmental impacts. Perhaps more significantly, it would integrate the consideration of low impact development techniques into the land use planning process at the time of project design and development – rather than the all-too-common current occurrence where these techniques are evaluated after substantial approvals are in place and changes are difficult to retro-fit. The best way to use CEQA as the tool to accomplish the integration of low impact development techniques would be to establish LID numeric standards as ***presumptive thresholds of environmental significance***, which would significantly increase the level of analysis of water quality impacts – at the time when changes are most likely to be accommodated. We offer more detailed analysis of this approach in the accompanying attachment, which is – again – the CEQA integration proposal that we have lodged before. The CEQA integration approach would achieve the Board's goals of appropriate attentiveness and reasonable consistency between jurisdictions and permits, while maintaining the ability to make local decisions appropriate for the jurisdiction's environmental circumstance.

5. The numerical performance criteria are justified and unworkable.

The 4th Draft Permit reflects the continued inclusion of numerical treatment BMP performance standards in Appendix C, which could be interpreted as arbitrary numeric effluent limits which would be imposed irrespective of site-specific considerations and/or storm-specific considerations. A reasonable approach would be to require consideration of such constituents and there management during planning and design, but not to treat them as performance standards for ongoing maintenance and compliance, due to the myriad of factors (site-specific and storm-specific circumstances) that could influence exceedances. We therefore ask that the Table 3 be either deleted or simply used as design goals, from which the permittees could develop design criteria for treatment control BMP performance and include these criteria in an updated version of the Ventura County Stormwater Design Manual.

* * * * *

Since the first draft was released, the BIA and its affiliates have been active participants and contributors to the creation of new and improved MS4 permit. We continue to believe that rational, *implementable* permit requirements are critical to achieving great progress concerning water quality and our environment. We hope that these comments are received in the manner in which they are intended – to continue the discussion of how we can create a workable permit that improves water quality to the maximum extent practicable. We remain committed to a positive dialog with the Board and its staff – one that will result in an informed, balanced and effective permit.

Thank you for your consideration of these comments.

Sincerely,

Andrew R. Henderson
Vice President and General Counsel,
Building Industry Association of Southern
California and General Counsel,
Building Industry Legal Defense Foundation

Holly Schroeder
CEO, Building Industry Association
LA/Ventura Chapter